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Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–2454 OF 2009
LOW HOP BING, SYED AHMAD HELMY AND ZAHARAH IBRAHIM JJCA
30 DECEMBER 2010

Civil Procedure — Inherent powers — Whether court had inherent powers to make consequential orders — Rules of the High Court 1980 O 92 r 4 — Rules of the Court of Appeal 1994 r 4

Company — Directors — Duties — Whether directors' resolution for joint venture agreement ('JVA') and irrevocable power of attorney validly passed — Whether defendant was dealing in good faith with plaintiff's board of directors — Whether defendant protected by rule in Turquand's case — Whether plaintiff became defendant's constructive trustee upon completion of joint venture project — Whether fiduciary relationship had been created between plaintiff and defendant under JVA

Contract — Agreement — Validity — Plaintiff and defendant entered into joint venture agreement ('JVA') and irrevocable power of attorney ('IPA') — Whether JVA and IPA valid and binding — Breach — Whether plaintiff could rely on its own breach to terminate JVA

Contract — Sale and purchase of land — Plaintiff entered into agreement to sell defendant's lots to intervener one month before judgment delivered on plaintiff's originating summons — Whether intervener had constructive notice of defendant's proprietary interest in land — Whether intervener bona fide purchaser acting with good faith — Whether sale could be construed as bona fide transaction

Ezzen Heights Sdn Bhd ('the plaintiff') and Ikhlas Abadi Sdn Bhd ('the defendant') entered into a joint venture agreement ('the JVA') dated 4 January 2007 to jointly develop the plaintiff's land situated in Johor ('the land') into 12 lots of shop houses, of which the plaintiff was entitled to four lots ('the plaintiff's lots') and the defendant developer the remaining eight lots ('the defendant's lots'). The parties also entered into an irrevocable power of attorney ('IPA') on the same date. Under cl 2(a) of the JVA the parties had expressly agreed, inter alia, that the contractual obligation of obtaining the approval

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from the appropriate authorities for the amended building plans would rest on the plaintiff. This meant that the plaintiff had to obtain the said approval on or before 4 July 2007, which it had not done. However, cl 2(b) of the JVA provided that if the plaintiff was unable to obtain the approval by 4 July 2007, then the parties could mutually agree to extend the time. After the completion date of the development on 2 January 2009, the plaintiff terminated the JVA and IPA by arguing that a breach of cl 2(a) of the JVA had put an end to the JVA. When the defendant challenged the purported termination, the plaintiff filed an originating summons ('the OS') seeking, inter alia, a declaration that the JVA and IPA were null and void or alternatively a declaration that the IPA was invalid and annulled. Before the High Court could deliver judgment on the OS, the plaintiff purportedly sold the defendant's lots to a third party, Soh Yuh Mian ('the intervener'). The defendant asserted that the JVA and IPA were valid. The defendant submitted that it was the beneficial owner of the defendant's lots and that the plaintiff had no right to sell those lots to the intervener. The defendant thus prayed for consequential orders to remove the intervener's private caveat, to restrain the plaintiff and the intervener from dealing with the defendant's lots and for the plaintiff and the intervener to deliver the defendant's lots to the defendant. The intervener submitted that he was a bona fide purchaser and thus no consequential orders should be made against him. The High Court dismissed the OS holding, inter alia, that the JVA and the IPA were valid and that the defendant was entitled to the defendant's lots as agreed in the JVA. This was the plaintiff's appeal against that decision.

Held, dismissing the appeal and granting the defendant the consequential orders with costs to the defendant:

(1) The JVA and the IPA were validly executed by the plaintiff's directors. In the circumstances the directors' resolution for the JVA and IPA would bind and continue to bind the plaintiff in favour of the defendant until and unless the said resolution was dissolved, cancelled or annulled either expressly or by implication. The plaintiff's claim that the IPA was executed without the plaintiff's approval at the general meeting could not be sustained as the defendant was well protected under the rule in *Royal British Bank v Turquand* (1856) 6 E&B 327 (*Turquand's* case). The defendant was dealing with the plaintiff in good faith at all material times and was acting on the directors' resolution of the plaintiff. Thus, it could not be deemed to have constructive notice of some failure to comply with an internal rule of management, which it had no means of discovering. The general rule in *Turquand's* case would apply to the facts in the instant appeal and the facts did not attract the application of the exceptions to this rule. As such, the plaintiff was not permitted to repudiate its liabilities under the JVA and IPA (see paras 14–15, 20).

(2) Upon completion of the joint venture project on 2 January 2009, the plaintiff became a constructive trustee in equity for the defendant in

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respect of the defendant's lots to which the defendant was entitled under the JVA. Applying the legal principles to the instant appeal it was found that the defendant's proprietary interest was enforceable in equity against the plaintiff as constructive trustee and the intervener as the subsequent holder of the defendant's lots. In addition to the constructive trust, a fiduciary relationship had been created between the plaintiff and the defendant under the JVA. The plaintiff, being a party to the JVA, owed the defendant fiduciary duties, including the duty of utmost good faith and was not entitled to act in a manner contrary to these fiduciary duties. The sale of the defendant's lots to a third party such as the intervener herein would clearly constitute a breach by the plaintiff of its fiduciary duties (see paras 21–26).

(3) After the completion date, the plaintiff had relied on its own breach of cl 2(a) to terminate the JVA and to allow the plaintiff to benefit from its own breach would be inequitable and unconscionable (see para 31).

(4) As the defendant had entered a private caveat on the land, the intervener had constructive notice of the defendant's proprietary interest in the defendant's lots. Despite the constructive notice of the defendant's private caveat, the intervener had purchased the defendant's lots from the plaintiff. In the circumstances, the intervener was not a bona fide purchaser acting in good faith without notice of the rights of the defendant. Hence the intervener could not have acquired the interest of the defendant's lots and could not legally defeat the defendant's entitlement under the terms of the valid JVA. Further the sale of the defendant's lots by the plaintiff to the intervener, which took place one month before the judgment was delivered on the OS, was a subversion of judicial proceedings (see paras 36–38).

(5) The facts and circumstances of the instant appeal would attract the application of O 92 r 4 of the Rules of the High Court 1980 which conferred on the High Court and, by virtue of r 4 of the Rules of the Court of Appeal 1994, on this court the inherent powers to make consequential orders to prevent injustice. As such the defendant would be granted the consequential orders to remove the intervener's private caveat, to restrain the plaintiff and the intervener from dealing with the defendant's lots and for the plaintiff and the intervener to deliver the defendant's lots to the defendant (see paras 39–41).

[Bahasa Malaysia summary

Ezzen Heights Sdn Bhd ('plaintif') dan Ikhlas Abadi Sdn Bhd ('defendan') telah menandatangani perjanjian usahasama ('PU') bertarikh 4 Januari 2007 untuk secara bersesama memajukan tanah plaintif yang terletak di Johor ('tanah tersebut') kepada 12 lot-lot rumah kedai, di mana plaintif berhak ke atas empat lot ('lot-lot plaintif') dan defendan pemaju terhadap lapan lot yang

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lain ('lot-lot defendan'). Pihak-pihak juga telah menandatangani surat kuasa wakil yang tidak boleh dibatalkan ('SKW') pada tarikh yang sama. Di bawah klausa 2(a) PU pihak-pihak dengan nyata telah bersetuju, antara lain, bahawa obligasi kontraktual untuk mendapatkan kebenaran daripada pihak-pihak berkuasa yang berpatutan untuk pemindaan pelan bangunan terletak pada plaintif. Ini bermaksud plaintif harus meminta kebenaran tersebut pada atau sebelum 4 Julai 2007, yang mana tidak dilakukan. Walau bagaimanapun, klausa 2(b) PU memperuntukkan bahawa sekiranya plaintif gagal untuk mendapatkan kebenaran tersebut sehingga 4 Julai 2007, pihak-pihak secara bersama bersetuju untuk melanjutkan tempoh. Selepas tarikh penyempurnaan untuk pembangunan tersebut pada 2 Januari 2009, plaintif telah membatalkan PU dan SKW dan berhujah bahawa pelanggaran klausa 2(a) PU telah membatalkan PU. Apabila defendan mencabar pembatalan tersebut, plaintif telah memfailkan saman pemula ('SP') memohon, antara lain, deklarasi bahawa PU dan SKW adalah batal dan tidak sah atau sebagai alternatif deklarasi bahawa SKW adalah tidak sah dan terbatal. Sebelum Mahkamah Tinggi membuat penghakiman untuk SP, plaintif telah menjual lot-lot defendan kepada pihak ketiga, Soh Yuh Mian ('pencelah'). Defendan menyatakan bahawa PU dan SKW adalah salah. Defendan berhujah bahawa ia adalah pemilik benefisial lot-lot defendan dan bahawa plaintif tidak mempunyai hak untuk menjual lot-lot tersebut kepada pencelah. Defendan oleh itu memohon untuk perintah berbangkit untuk mengeluarkan kaveat persendirian pencelah, menghalang plaintif dan pencelah daripada menguruskan lot-lot defendan dan untuk plaintif dan pencelah menyerahkan lot-lot kepada defendan. Pencelah berhujah bahawa dia merupakan pembeli bona fide dan oleh itu perintah berbangkit tidak patut dibuat terhadapnya. Mahkamah Tinggi menolak keputusan saman pemula tersebut, antara lain, bahawa PU dan SKW adalah sah dan bahawa defendan berhak terhadap lot-lot defendan seperti yang dipersetujui di dalam PU. Ini merupakan rayuan plaintif terhadap keputusan tersebut.

Diputuskan, menolak rayuan dan memberikan perintah berbangkit kepada defendan dengan kos kepada defendan:

(1) PU dan PKW telah ditandatangani dengan sah oleh pengarah-pengarah plaintif. Dalam keadaan ini, resolusi pengarah-pengarah untuk PU dan SKW akan mengikat dan seterusnya mengikat plaintif berpihak kepada defendan sehingga dan melainkan resolusi tersebut telah dibubarkan, dibatalkan atau dimansuhkan sama ada secara nyata atau implikasi. Tuntutan plaintif bahawa SKW telah ditandatangani tanpa kebenaran plaintif di mesyuarat umum tidak boleh dibenarkan memandangkan defendan dilindungi di bawah peraturan di dalam *Royal British Bank v Turquand* (1856) 6 E&B 327 ('kes *Turquand*'). Defendan telah berurusan dengan plaintif dalam niat yang amat baik pada setiap masa matan dan telah bertindak berdasarkan resolusi pengarah-pengarah

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plaintif. Justeru, ia tidak boleh dianggap untuk mendapat notis konstruktif tentang sebarang kegagalan untuk mematuhi peraturan dalaman pengurusan, yang mana ia tidak mempunyai apa-apa cara untuk mengetahuinya. Peraturan am di dalam kes *Turquand* boleh diguna pakai kepada fakta-fakta di dalam rayuan ini dan fakta-fakta tidak membawa kepada penggunaan pengecualian-pengecualian peraturan ini. Oleh demikian, plaintif tidak dibenarkan untuk menafikan liabiliti-liabilitinya di bawah PU dan SKW (lihat perenggan 4–15, 20).

(2) Setelah penyempurnaan projek usahasama pada 2 Januari 2009, plaintif menjadi pemegang amanah konklusif dalam ekuiti kepada defendan berkenaan dengan lot-lot defendan yang mana defendan berhak di bawah SKW. Dengan menggunakan prinsip undang-undang kepada rayuan ini, adalah didapati bahawa kepentingan proprietari defendan berkuatkuasa dalam ekuiti terhadap plaintif sebagai pemegang amanah konstruktif dan pencelah sebagai pemegang kemudian lot-lot defendan. Tambahan kepada amanah konstruktif, hubungan fidusiari telah tercipta di antara plaintif dan defendan di bawah PU tersebut. Plaintif, pihak kepada PU, mempunyai kewajipan fidusiari terhadap defendan, termasuk kewajipan niat baik sepenuhnya dan tidak berhak untuk bertindak dalam cara yang berlawanan dengan kewajipan fidusiari tersebut. Penjualan lot-lot defendan kepada pihak ketiga seperti pencelah dengan jelas membawa kepada pelanggaran kewajipan fidusiari oleh plaintif (lihat perenggan 21–26).

(3) Selepas tarikh penyempurnaan, plaintif telah bergantung kepada pelanggarannya terhadap klausa 2(a) untuk membatalkan PU dan untuk membenarkan plaintif untuk mendapat faedah daripada pelanggarannya sendiri adalah tidak adil dan tidak berpatutan (lihat perenggan 31).

(4) Memandangkan defendan telah memasukkan kaveat persendirian ke atas tanah tersebut, pencelah mempunyai notis konstruktif tentang kepentingan proprietari defendan terhadap lot-lot defendan. Di sebalik notis konstruktif tentang kaveat persendirian defendan, pencelah telah membeli lot-lot defendan daripada plaintif. Dalam keadaan ini, pencelah bukanlah pembeli bona fide yang bertindak dengan niat baik tanpa notis tentang hak-hak defendan. Oleh itu, pencelah tidak boleh memperolehi faedah terhadap lot-lot defendan dan tidak boleh menyangkal hak defendan di sisi undang-undang di bawah PU yang sah. Tambahan, penjualan lot-lot defendan oleh plaintif kepada pencelah, yang mana mengambil tempat sebulan sebelum penghakiman disampaikan terhadap SP, merupakan subversi prosiding kehakiman (lihat perenggan 36–38).

(5) Fakta-fakta dan keadaan rayuan ini boleh membawa kepada penggunaan A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 yang mana memberikan, Mahkamah Tinggi dan mengikut k 4 Kaedah-Kaedah

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Mahkamah Rayuan 1994, mahkamah ini kuasa sedia ada untuk membuat perintah berbangkit untuk menghindari ketidakadilan. Oleh demikian, defendan boleh diberikan perintah berbangkit untuk mengeluarkan kaveat persendirian pencelah, untuk menghalang plaintif dan pencelah daripada menguruskan lot-lot defendan dan untuk plaintif dan pencelah menyerahkan lot-lot defendan kepada defendan (lihat perenggan 39–41).]

Notes:

For a case on inherent power, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3134.

For cases on sales and purchase of land in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4900–5059.

For cases on agreement in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2466–2492.

For cases on duties of director, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 212–225.

Cases referred to

Chan Thiam Teng v Ban Swee Heng Sdn Bhd [1992] 2 MLJ 583, HC (refd)

Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513, FC (refd)

Connelly v DPP [1964] AC 1254, HL (refd)

Dominic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors [2007] 2 MLJ 761, HC (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

Gloucester County Bank v Rudry Merthyr Steam and House Coal Colliery [1898] 1 Ch 629 (refd)

Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd [2008] 4 MLJ 839; [2008] 6 AMR 763 (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd [1999] 2 MLJ 481; [1999] 2 AMR 2501,CA (refd)

Haw Par Brothers International Ltd and & Anor v Jack Chiarapurk & Ors [1991] 2 MLJ 428, HC (refd)

Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189, SC (refd)

Howard v Patent Ivory Manufacturing Co (1888) 38 Ch D 156 (refd)

K Sivapragasam a/l Krishnar v Renominium Development Sdn Bhd & Ors [1998] 4 MLJ 535, CA (refd)

Kanssen v Rialto (West End) Ltd [1944] Ch 346 (refd)

Mahfuz bin Hashim v Koperasi Pekebun Kecil Daerah Segamat & Ors [2005] 3 MLJ 726, HC (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353; [2000] 2 AMR 1730, FC (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)

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Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 (refd)
Royal British Bank v Turquand (1885) 5 E & B 248 (refd)
Standard Chartered Bank v Central Wood Tiles Sdn Bhd [1990] 2 MLJ 361, HC (refd)
Westdeutsche Landesbank v Islington, HL [1996] AC 669 HL (folld)

Legislation referred to

National Land Code Form 19B
Rules of the Court of Appeal 1994 r 4
Rules of the High Court 1980 O 92 r 4

V Rajadevan (R Ananthan with him) (Ananth & Associates) for the appellant. Wong Kim Fatt (Wong Boon Lee with him) (Gulam & Wong) for the respondent. Devinder Kaur (Syuhaila & Co) for the intervener.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This appeal was brought by the appellant company ('the plaintiff') against the decision of the High Court in dismissing with costs the plaintiff's amended originating summons ('the OS') which sought, inter alia, a declaration that the joint venture agreement entered into between the plaintiff as the landowner and the respondent company ('the defendant') as the developer ('the JVA'), and the irrevocable power of attorney ('the IPA'), both dated 4 January 2007, are null and void, or alternatively a declaration that the IPA is invalid and annulled.

FACTUAL BACKGROUND

[2] The plaintiff and the defendant entered into the JVA to jointly develop the plaintiff's land held under GM 473, Lot No 412, Mukim of Padang Endau, District of Mersing, State of Johor ('the land') into 12 lots of four storey shop offices, out of which pursuant to cl 3(a) of the JVA, the plaintiff shall be entitled to four lots ('the plaintiff's lots') and the defendant, the remaining eight lots ('the defendant's lots') (for brevity and convenience, a reference hereinafter to a clause is a reference to that clause in the JVA).

[3] On 2 January 2009 ('the completion date'), the plaintiff had taken possession of the plaintiff's lots.

[4] Subsequently, the plaintiff's former solicitors Kuan & Co, vide letter dated 10 February 2009, unilaterally declared that the JVA has been terminated.

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[5] The defendant's solicitors Gulam & Wong, vide letter dated 1 April 2009, challenged the purported termination. A

[6] The plaintiff then filed the OS seeking, inter alia, to declare the JVA and IPA null and void. Before the High Court could deliver judgment on 3 September 2009, the plaintiff had purportedly sold the defendant's lots to the intervener. B

[7] The plaintiff's OS was dismissed by the High Court on 3 September 2009. On 27 July 2010, we heard and dismissed the plaintiff's appeal. Our grounds are set out below. C

SOLE GROUND OF APPEAL

[8] The plaintiff raised eight grounds in the memorandum of appeal. However, learned counsel Mr V Rajadevan (assisted by Mr R Ananthan) relied solely on ground four, to the effect that 'the learned Judge erred in law … in failing to consider that by effluxion of time the joint venture agreement had lapsed on 4 July 2007'. The plaintiff's counsel relied on the failure of the plaintiff (as the landowner) to obtain the approval for the amended building plans within the prescribed period of six months under cl 2(a) and (b) to persuade the High Court, and now this court, to declare the JVA and the IPA null and void, in order to repudiate the plaintiff's liabilities under these two documents. D E

[9] Learned counsel Dr Wong Kim Fatt (Mr Wong Boon Lee with him) asserted for the defendant that the JVA and the IPA, executed pursuant to cl 5(xv), are valid. They took the view that the defendant is the beneficial owner of the defendant's lots which the plaintiff had no right to sell, and that no title whatsoever could pass to the intervener. In the circumstances, the defendant prayed for consequential orders to remove the intervener's private caveat, to restrain the plaintiff and the intervener from dealing in any manner whatsoever with the defendant's lots, to direct the plaintiff to honour the undertaking to deliver the issue document of title to the defendant, and to deliver the defendant's lots to the defendant, in the interest of justice based on the inherent jurisdiction of the court. F G H

[10] The intervener's learned counsel Ms Devinder Kaur maintained that the intervener was a bona fide purchaser, and so no consequential orders should be made. The plaintiff's learned counsel associated himself with the intervener's submission. I

[11] The High Court dismissed the OS holding, inter alia, that the JVA and the IPA are valid, and that the defendant is entitled to the defendant's lots pursuant to cl 3(a).

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[12] Upon a careful consideration of the above submissions and the decision of the High Court, we identified the question for determination in this appeal as follows:

> Upon a proper perusal of the JVA and the IPA, and in the light of the factual background unfolded above, are the JVA and the IPA valid and binding?

[13] The answer to the above question entails an in depth discussion of important principles touching on the legal effect of the JVA and the IPA.

LEGAL EFFECT OF THE JVA AND IPA

[14] The JVA was executed by the plaintiff's (then) directors viz Yong Siok Cheng and Yong Ee Chuang. The plaintiff had affixed its common seal pursuant to its directors' resolution which was duly and validly passed on 2 January 2007 in accordance with its articles of association. The IPA was prepared pursuant to cl 5(xv) and executed by the authorised directors in accordance with the directors' resolution of the plaintiff. It was attested by the plaintiff's own solicitors and forwarded to the defendant's solicitors on 10 January 2007. It was duly registered in the Johor Bahru High Court vide No 282/2007 dated 25 January 2007. Until and unless it is dissolved, cancelled or annulled, either expressly or by implication, the directors' resolution for the JVA and the IPA shall bind and continue to bind the plaintiff in favour of the defendant: see eg *Chan Thiam Teng v Ban Swee Heng Sdn Bhd* [1992] 2 MLJ 583 at p 586B.

[15] The plaintiff's claim that the IPA was executed without the plaintiff's approval at the general meeting cannot be sustained. The defendant was dealing with the plaintiff in good faith at all material times and was acting on the directors' resolution of the plaintiff. The defendant is well protected under the rule in *Turquand*'s case, *Royal British Bank v Turquand* (1885) 5 E & B 248.

[16] This rule has been succinctly stated by the Federal Court through the judgment Mohamad Azmi SCJ (as then was) in *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 at p 199, in the following words:

> ... a person dealing with a company does not need to enquire into the regularity in the internal affairs and proceedings of the company and may assume that all is being done regularly.

(See also eg *Mahfuz bin Hashim v Koperasi Pekebun Kecil Daerah Segamat & Ors* [2005] 3 MLJ 726 at p 740; *Standard Chartered Bank v Central Wood Tiles Sdn Bhd* [1990] 2 MLJ 361; and *K Sivapragasam a/l Krishnar v Renominium Development Sdn Bhd & Ors* [1998] 4 MLJ 535).

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[17] By way of amplification, this rule prescribes that if a person deals in good faith with the board of directors or other representative body of a company which is in fact exercising powers of management and direction of its business and affairs, that person is not affected by defects of procedure within the company or by its failure to fulfil conditions which are required by the company's memorandum or articles to be fulfilled before the act or transaction in question is effected. The legal basis of the rule is that a person dealing with a company has no right to insist on proof by its directors that the provisions of its memorandum or articles have been complied with, and he cannot therefore be deemed to have constructive notice of some failure to comply which he has no means of discovering (*Gloucester County Bank v Rudry Merthyr Steam and House Coal Colliery* [1898] 1 Ch 629 at p 636 per Lindley LJ). Of course, a person dealing with a company will not be able to rely on the rule, and the company may refuse to be bound by the transaction, if he knows that there has been some failure to comply (*Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156), or if he knows facts which would lead a reasonable man to enquire further and so discover the failure to comply (*Kanssen v Rialto (West End) Ltd* [1944] Ch 346). The rule in *Royal British Bank v Turquand* is designed to protect persons dealing with the company, not to protect the company itself: *Pennington's Company Law* (2nd Ed) at pp 137–138.

[18] We pause here for a moment to say that the general rule in *Turquand* applies to the facts in the instant appeal. These facts however do not attract the application of the exceptions enunciated by *Pennington* above.

[19] Closer to our shores, *Walter Woon's Company Law* (2nd Ed) at pp 89–90 explained this rule in the following passage:

> The actual authority of an agent is a relationship between principal and agent; the rest of the world is a stranger to this relationship. A third party dealing with the agent of a company does not know what the agent's actual authority is, nor in most cases can he find out. Sometimes the authority of an agent to do certain acts depends on compliance with certain formalities. For instance, it may be provided by the company's articles that the affixing of the company's seal can only be authorized by a resolution of the board. Sometimes, there is some irregularity in the management which vitiates the authority conferred upon an agent. For instance, a directors' meeting may have been irregularly held. A party outside the company has no way of determining whether the company's internal regulations have been complied with. However, the law does not require an outside party to do so. If an agent has apparent authority to do an act, a person dealing with the company is entitled to assume that all matters of internal management and procedure prescribed by the articles have been complied with. This is known as the 'indoor management rule' or the rule in *Turquand*'s case. The rule in *Turquand*'s case is a presumption of regularity. In other words, a person who deals with a company is entitled to assume that all procedural matters have been taken care of by the company. There is a good practical reason for this: an outsider cannot discover whether the company's internal procedures have

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A been complied with. If a company could get out of a transaction by pleading non-compliance with its internal procedures, commercial certainty would be thrown out of the window.

B **[20]** By reason of the foregoing grounds, our answer to the above question is in the affirmative. That being the case, the plaintiff is not permitted to repudiate its liabilities under the JVA and the IPA. These liabilities are obvious upon an analysis of the following issues:

C (a) the plaintiff as trustee and fiduciary;

(b) the plaintiff's obligation to obtain approval;

(c) the plaintiff's reliance on its own breach;

(d) the plaintiff's failure to honour the undertaking to deposit the issue document of title;

D

(e) the plaintiff's sale of defendant's lots to the intervener; and

(f) consequential orders.

E THE PLAINTIFF AS TRUSTEE AND FIDUCIARY

[21] Upon completion of the joint venture project on 2 January 2009, the plaintiff became a constructive trustee in equity for the defendant in respect of the defendant's lots to which the defendant was entitled under the JVA. The

F defendant was the equitable or beneficial owner of the defendant's lots. This is evident in cl 3(a) which expresses the defendant's entitlement (as 'the company' therein) in the following clear and unambiguous words:

G 3(a) It is hereby agreed by the parties hereto that the Landowner shall be entitled to four (4) lots of the four (4) story shopoffices as comprised in the Building and outline in RED in the site plan (hereinafter collectively referred to as 'the Landowner's Lots') upon completion of the Project whereas the Company shall be entitled to the remaining eight (8) lots of the four (4) storey shopoffices as comprised in the Building and outline in BLUE in the site plan (hereinafter collectively referred to as 'the Company's Lots').

H

[22] The said constructive trust arises by operation of law eg from the plaintiff's unconscionable conduct or abuse of fiduciary relationship between the plaintiff as trustee (or legal owner) and the defendant as cestui que trust (or

I beneficiary). The constructive trust enables the defendant as beneficiary to enforce the trustee's ('the plaintiff's') conscience in relation to the trustee's ('the plaintiff's') treatment of the beneficiary's ('the defendant's') lots, or the abuse of fiduciary duties which the trustee ('the plaintiff') owes to the beneficiary ('the defendant').

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[23] In *Westdeutsche Landesbank v Islington* [1996] AC 669 (HL), Lord Browne-Wilkinson propounded, inter alia, the following principles.

(a) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust); and

(b) Once a trust is established, as from the date of its establishment, the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

[24] Applying these principles to the instant appeal, we are of the view that the defendant's proprietary interest is enforceable in equity against the plaintiff as the constructive trustee and the intervener as the subsequent holder of the defendant's lots. The defendant as the beneficiary can trace those proprietary rights into the original property in so far as the plaintiff is considered, or the substituted property into which it can be traced, except where the intervener can prove that he is 'equity's darling'; ie, 'a purchaser for value of the legal interest without notice': *Westdeutsche Landesbank v Islington*.

[25] In addition to the constructive trust, a fiduciary relationship has been created between the plaintiff and the defendant under the JVA. Support for this proposition may be found in *Haw Par Brothers International Ltd and Tiger Balm Ltd v Jack Chiarapurk* [1991] 2 MLJ 428. At p 433, Chao Hick Tin J (of the Singapore High Court) held, inter alia, that there was a fiduciary relationship to the joint venture therein, or at least an arguable case for such a relationship.

[26] The plaintiff, being a party to the JVA, owes the defendant fiduciary duties, including the duty of utmost good faith: see eg *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 1 MLJ 513 (FC); *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (SC); *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353 ; [2000] 2 AMR 1730 (FC); and *Hartela Contractors Ltd v Hartecon JV Sdn Bhd* [1999] 2 MLJ 481 ; [1999] 2 AMR 2501 (CA). The plaintiff is not entitled to act in a manner contrary to these fiduciary duties. Any sale by the plaintiff as constructive trustee of the defendant's lots to a third party such as the intervener herein would clearly constitute a breach by the plaintiff of the fiduciary duties.

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A THE PLAINTIFF'S OBLIGATION TO OBTAIN APPROVAL

[27] Pursuant to cll 2(a) and (b), the parties have expressly agreed to the plaintiff's contractual obligation of obtaining the relevant approval. The relevant portions read:

B

> 2(a) The parties hereto hereby expressly agree that this Agreement is subject to and conditional upon *the Landowner obtaining the approval of the appropriate authorities for the amended Building Plans (and specifications thereof) of the Building to be erected on the said Land* …
>
> C
>
> 2(b) In the event any one or more of the Approvals (including any appeals relating thereto) is/are not obtained for any reason whatsoever within Six (6) Months from the date of this Agreement and unless this Agreement is extended by the parties hereto for such period(s) of time as the parties shall mutually agree upon, this Agreement shall be deemed to be automatically terminated and thereafter this Agreement shall be null and void and of no further force or effect whatsoever and neither party hereto shall have any claims whatsoever against the other.
>
> D

(Emphasis added.)

E

[28] Under cl 2(a), the parties have expressly agreed, inter alia, that the contractual obligation of obtaining the approval from the appropriate authorities for the *amended building plans* rests on the landowner ie the plaintiff.

F

[29] The parties had further expressly agreed that the time frame for the plaintiff to obtain the approval for the amended building plans is six months from 4 January 2007, the date of the JVA. That would be on or before 4 July 2007. It also expressly provides that in the event the plaintiff is unable to obtain the approval by 4 July 2007, the parties may mutually agree to extend the time pursuant to cl 2(b).

G

[30] As there was no mutual agreement to extend the time pursuant to cl 2(b), the plaintiff was in breach of cl 2(a) when the plaintiff's architects, Ho & Associates, submitted the amended building plans vide letter dated 28 August 2007 to the *Pejabat Majlis Daerah Mersing* (Mersing District Council) for approval. The amended building plans were only approved by the said council on 4 November 2007, vide the council's letter dated 1 December 2007, thereby exceeding the prescribed time frame by four months.

H

I THE PLAINTIFF RELYING ON OWN BREACH

[31] After the completion date (2 January 2009), the plaintiff had, pursuant to the letter of termination dated 10 February 2009, relied on its own breach of

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cl 2(a) to put an end to the JVA. In our view, to allow the plaintiff to put an end to the JVA based on its own breach is to allow the plaintiff (as a defaulting party) to benefit from its own breach. That would be inequitable and unconscionable. This proposition is discernible from *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC), where Wan Hamzah SCJ (as he then was), in delivering the judgment of the (then) Supreme Court, said at p 304 F–H that:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, vide the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v SDAECD France* [1919] AC 1.

[32] The above passage was applied by this court in *Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd* [2008] 4 MLJ 839; [2008] 6 AMR 763 at p 769 [8], where Gopal Sri Ram JCA (later FCJ) affirmed the established principle that a party cannot rely on its own wrong to defeat its opponent's claim.

THE PLAINTIFF'S FAILURE TO DEPOSIT TITLE

[33] Under cl 5(xi), the plaintiff undertook to deposit the original issue document of the land title with M/s Lim & Hooi as stakeholders. M/s Lim & Hooi had sent a letter dated 16 January 2009 to M/s KH Choo & Co demanding the deposit of the title pursuant to cl 5 (xi). However that request has not been met. Till to date, the plaintiff had failed, neglected and/or refused to do so. As a result the defendant was unable to surrender the title to the appropriate authorities for the purpose of applying for the issuance of separate titles for the individual units of the lots in accordance with cl 5(xi). This is another example of the plaintiff's breach of the JVA.

THE PLAINTIFF'S SALE OF THE DEFENDANT'S LOTS TO INTERVENER

[34] In breach of the constructive trust and fiduciary duties under the JVA, the plaintiff had on 6 August 2009, without any directors' resolution or shareholders' resolution, sold the defendant's lots to the intervener. The sale took place about one month before the judgment was delivered by the learned High Court judge on 3 September 2009.

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[35] The plaintiff had by the sale blatantly breached cl 5(ii) which reads:

> 5 The Landowner hereby warrants, covenants and undertakes with the Company as follows:
>
> (i) …
>
> (ii) the Landowner shall not at any time hereafter sell, transfer, lease, let, charge, dispose or otherwise encumber howsoever the said Land or any part(s) thereof or any rights, interest and or benefit therein or purport to do any of such acts or things save and except in respect of the Landowner's Lots only;
>
> (iii) …

[36] The issue whether the intervener is 'equity's darling' has to be addressed in relation to the intervener's notice or constructive notice of the defendant's proprietary interest in the defendant's lots. Significantly, we note that as early as 6 April 2007, the defendant had entered a private caveat vide presentation No 100/2007 on the land. This is evident from the defendant's application in Form 19B and the statutory declaration in support thereof. At all material times, the defendant's private caveat was still subsisting. We are of the view that the intervener knew or had notice, or ought to have known or to have notice, of the defendant's prior proprietary interest in the defendant's lots. Despite the intervener's notice or constructive notice of the defendant's private caveat, the intervener had on 26 August 2009 purchased the defendant's lots from the plaintiff. Further, the intervener had on 1 September 2009 entered a private caveat vide presentation No 237/2009 on the land as in Form 19B, supported by the intervener's statutory declaration. In the circumstances, the intervener is not entitled to rely on the defence of 'equity's darling' as the intervener was not a bona fide purchaser acting in good faith without notice of the rights of the beneficiary ie the defendant in the instant appeal.

[37] As the defendant, being the beneficial owner, is entitled to the defendant's lots, the plaintiff had no title to sell the defendant's lots to the intervener. The plaintiff could not pass any title to the intervener. *Nemo dat quod non habet* (No one can give what he does not have). Hence, the intervener could not have acquired the interest of the defendant's lots and could not legally defeat the defendant's entitlement under the terms of the valid JVA.

[38] The sale and purchase agreement entered into between the plaintiff and the intervener in respect of the defendant's lots, in the face of the proceedings pending in the High Court and before the decision of the High Court on 3 September 2009, was an affront to and a subversion of judicial proceedings. The sale and purchase of the defendant's lots cannot be construed as a bona fide

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transaction.

CONSEQUENTIAL ORDERS

[39] Order 92 r 4 confers on the High Court and, by virtue of r 4of the Rules of the Court of Appeal 1994, on this court, inherent powers eg to make consequential orders to prevent injustice. O 92 r 4 merits reproduction as follows:

> 4 For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[40] The inherent powers of the High Court and the Court of Appeal have been given statutory recognition by way of subsidiary legislation in Order 92 r 4. These potentially wide powers are procedural and may be exercised as residuary or reserve powers to suppress an abuse of the process of the court and to defeat any attempted thwarting of its process: see eg *Connelly v Deputy Public Prosecutor* [1964] AC 1254 at p 1301 (HL) per Lord Morris. These powers include all the powers that are necessary to fulfil itself as a court of law; to uphold, to protect, and to fulfill the judicial function of administering justice in a regular, orderly and effective manner: per Edger Joseph JR J (later FCJ) in *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 at p 147. These powers may be invoked in an infinite variety of circumstances in pending proceedings. The categories are not closed: *Dominic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors* [2007] 2 MLJ 761 at pp 768–769 (on the scope of 'inherent jurisdiction' and 'inherent powers' of the court, see also the majority judgment delivered by me in *Ishak bin Hj Shaari v Public Prosecutor*, Court of Appeal Criminal Appeal No N-09–17 of 2005 dated 26 November 2010 and the cases cited therein).

[41] We are of the view that the facts and circumstances of the instant appeal would attract the application of O 92 r 4, particularly the making of consequential orders.

CONCLUSION

[42] On the foregoing grounds, we dismissed this appeal with costs of RM10,000 to the defendant, and affirmed the decision of the High Court. Deposit to be paid to the defendant on account of the fixed costs.

[43] Pursuant to O 92 r 4, we made the following consequential orders:

(a) an order that the caveat entered by the intervener vide presentation No 237/2009 on 1 September 2009 on the land be forthwith removed;

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(b) an order restraining the plaintiff and the intervener whether by themselves or their agents or otherwise from dealing in any manner whatsoever with the defendant's lots;

(c) an order directing the plaintiff and/or its solicitors including M/s TS Chong & Co, in possession of the issue document of title of the land, to forthwith deliver and deposit the original issue document of title with M/s Lim & Hooi; and

(d) an order directing the plaintiff and the intervener to deliver vacant possession of the defendant's lots to the defendant on or before 27 October 2010 ie within three months from the date we made our order on 27 July 2010.

Appeal dismissed and consequential orders granted with costs to defendant.

Reported by Kohila Nesan